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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PETE A. MORRISON,

Petitioner,

v.

GENUINE PARTS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOE R. WHATLEY, JR.
FALKENBERRY & WHATLEY
Fifth Floor Title Building
300 Twenty-First Street North
Birmingham, Alabama 35203
(205) 322-1100
Attorney for Petitioner
Pete A. Morrison

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

After an Employee is Willfully Denied a Promotion in Violation of the Age Discrimination in Employment Act, does a Resignation from a Lesser Job Conclusively Bar Him from Being Awarded the Illegally denied Job or Front Pay?

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PETE A. MORRISON,

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GENUINE PARTS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CITATIONS TO OPINIONS BELOW

Review is sought of an opinion from the United States Court of Appeals for the Eleventh Circuit, published at 828 F.2d 708 (11th Cir. 1987). The opinion was issued on September 28, 1987. It held in pertinent part that where an employee is denied a promotion in violation of the Age Discrimination and Employment Act, that employee may receive neither front pay nor an award of the illegally denied position if that employee chooses to resign from some lesser position between the date of the illegal act and the date of his trial. The verdict, opinions and orders of the district court are unpublished but are included in the Appendix.

JURISDICTION

The opinion of the Court of Appeals was entered on September 28, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C. § 626(c)(1)

Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this [Age Discrimination in Employment] Act.

STATEMENT OF THE CASE

This is an age discrimination case where the employer has been found guilty of willful age discrimination in denying Pete Morrison a promotion to the position of stock room supervisor.

However, the trial court refused to award Morrison the job of stock room supervisor, or alternatively some amount of front pay, because after he had been illegally denied the position of stock room supervisor, Morrison resigned from a lesser position with the employer.

It should be noted that the employer never raised any affirmative defense such as waiver or estoppel which might have barred the equitable relief requested by Morrison.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed, addressing the issue raised in this petition only in footnote stating:

> The district court having properly determined that there was no constructive discharge in this case, it is apparent that the termination of Morrison's employment resulted from voluntary resignation. Accordingly, the district court was also correct in denying front pay and reinstatement.

828 F.2d at 709 n.1.

The illegal act resulting in the denial of the promotion and the loss of the increase in pay occurred before Morrison's resignation.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ of certiorari because the holding of the courts below violates the well developed principle that a victim of employment discrimination should be made whole in any remedy. When Morrison was illegally denied a promotion, he became entitled to the award of that job, or some other appropriate relief such as front pay. A subsequent resignation has no effect on that entitlement.

Moreover, the ruling of the Court of Appeals for the Eleventh Circuit in this case conflicts with a ruling from the Court of Appeals for the Fourth Circuit.

I. THE RULING BELOW VIOLATES THE "MAKE WHOLE" REMEDIAL PURPOSE OF THE FEDERAL DISCRIMINATION LAWS.

The ruling of the United States Court of Appeals for the Eleventh Circuit violates the "make whole" remedial purpose of the federal discrimination laws.

The Age Discrimination in Employment Act truly rose out of Title VII of the 1964 Civil Rights Act. As noted in H. R. 805, § 715 of Title VII "direct[ed] the Secretary of Labor to make a study of the problem of age discrimination in employment." 2 1967 U.S. Code Cong. & Adm. News 2213, 2214. That study then prompted the ADEA. *Id.*

The ADEA provides that: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act." § 7(c) P.L. 90-202, 29 U.S.C. § 626(c)(1). The remedial purpose is to make whole the victims of illegal discrimination or "to provide full compensatory relief for losses. . . ." House Conf. Rep. No. 95-950, 3 1978 U.S. Code Cong. & Adm. News 528, 535.

This Court has discussed the "make whole" purpose of the federal discrimination laws most thoroughly in Title

VII cases. First, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975), the Court stated:

> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secur[e] complete justice," *Brown v. Swann*, 10 Pet. 497, 503 (1836); see also *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-398 (1946). "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684 (1946). Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. The terms "complete justice" and "necessary relief" have acquired a clear meaning in such circumstances. Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). And where a legal injury is of an economic character,
>
> > "[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock*, 6 Wall. 94, 99 (1867).
>
> The "make whole" purpose of Title VII is made evident by the legislative history.

In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 761 *et seq.* (1976), the Court expanded on the

"'make whole' purposes" of the federal discrimination laws. The Court quoted Congress as saying:

> [T]he Act is intended to make the victims of unlawful employment discrimination whole, and . . . the attainment of this objective . . . requires that persons aggrieved by the employment practice be, so far as possible, restored to a position where they would have been were it not for unlawful discrimination.

Id. at 764.

Morrison simply has not been made whole for his employer's illegal denial of his promotion.

II. THERE IS A CONFLICT BETWEEN THE CIRCUITS

In *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir. 1981), the Court affirmed the award of reinstatement where the employee was demoted in violation of the ADEA from the position in question and then resigned to take a position with a competitor. Here, the Eleventh Circuit has ruled as a matter of law that an employee cannot be awarded a position he was denied in violation of the ADEA if the employee subsequently resigns from employment with the defendant.

The writ of certiorari should be granted because the Court of Appeals' opinion is in conflict with the principles developed by this Court that a victim of discrimination should be made whole in the relief granted by a trial court and in that the decision is in conflict with the decision of another federal court of appeals.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

JOE R. WHATLEY, JR.
FALKENBERRY & WHATLEY
Fifth Floor Title Building
300 Twenty-First Street North
Birmingham, Alabama 35203
(205) 322-1100
Attorney for Petitioner
Pete A. Morrison

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 86-7480, 86-7521

PETE A. MORRISON,
Plaintiff-Appellant,
Cross-Appellee,

v.

GENUINE PARTS COMPANY,
Defendant-Appellee,
Cross-Appellant.

Sept. 28, 1987

Joe R. Whatley, Falkenberry, Whatley & Heidt, Birmingham, Ala., for plaintiff-appellant, cross-appellee.

Paul Beshears, Smith, Currie & Hancock, George McPherson, Atlanta, Ga., for defendant-appellee, cross-appellant.

Appeals from the United States District Court for the Northern District of Alabama.

Before HATCHETT and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

Morrison filed this action against his employer, Genuine Parts Company ("Genuine Parts"), alleging age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621. Morrison

alleged two violations: (1) that Genuine Parts failed to promote him; and (2) that Genuine Parts constructively discharged him. The case went to trial by jury, and at the close of Morrison's case, the court directed a verdict against Morrison on the constructive discharge claim. The jury returned a verdict in Morrison's favor on the promotion claim. The parties had stipulated to the amount of damages on the promotion claim, namely $3,566.62, although the district court later found that Morrison's actual damages were only $92.25. Morrison also claimed liquidated damages, which under the relevant statute amounts to a doubling of the actual damages.

The district court awarded plaintiff $3,566.62, pursuant to the stipulation on the promotion claim, plus $92.25 in liquidated damages. In effect, the district court held Genuine Parts to its stipulation as to the amount of actual damages notwithstanding the fact that the stipulation was in error. However, to avoid doubling the effects of the error, the district court relieved Genuine Parts from the effect of its stipulation with respect to liquidated damages.

The only issue on appeal that warrants discussion [1] is Morrison's argument that the district court abused its discretion in relieving Genuine Parts from the effect of its stipulation on the calculation of liquidated damages. Because the district court has broad discretion in determining whether to hold a party to its stipulation, *Coastal*

---

[1] Morrison also challenges the district court's direction of a verdict in favor of Genuine Parts on the constructive discharge issue. That issue is controlled by *Wardwell v. School Board of Palm Beach County*, 786 F.2d 1554 (11th Cir. 1986) (holding that mere failure to promote is not sufficient to support a finding of constructive discharge). The district court having properly determined that there was no constructive discharge in this case, it is apparent that the termination of Morrison's employment resulted from voluntary resignation. Accordingly, the district court was also correct in denying front pay and reinstatement. The other issues raised on appeal are without merit and warrant no discussion.

States Marketing, Inc. v. Hunt, 694 F.2d 1358, 1369 (5th Cir.1983), *relying on Del Rio Distributing, Inc. v. Adolph Coors Co.*, 589 F.2d 176, 178 (5th Cir.1979) (holding that "trial judge is vested with broad discretion in determining whether . . . a pre-trial order should be modified or amended."),[2] we find no error here. We conclude that the district court was acting well within its discretionary and equitable powers in refusing to relieve Genuine Parts from its erroneous stipulation with respect to actual damages, and in relieving Genuine Parts from this stipulation with respect to liquidated damages. The district court could have concluded that while holding Genuine Parts to its stipulation with regard to actual damages was appropriate under the circumstances, a doubling of the erroneous stipulation would have resulted in the kind of "manifest injustice" disapproved in *Central Distributors, Inc. v. M.E.T., Inc.*, 403 F.2d 943, 945 (5th Cir. 1968). Under such circumstances the district court had discretion to relieve Genuine Parts from its stipulation with respect to liquidated damages.

AFFIRMED.

---

[2] The *Coors* case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 85-AR-2564-S

PETE A. MORRISON,
Plaintiff

vs.

GENUINE PARTS COMPANY,
Defendant

[Filed June 19, 1986]

ORDER

In conformity with the accompanying Memorandum Opinion, plaintiff's request for injunctive relief is DENIED.

Costs are taxed against defendant.

DONE this 19th day of June, 1986.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 85-AR-2564-S

PETE A. MORRISON,
Plaintiff

vs.

GENUINE PARTS COMPANY,
Defendant

[Filed June 19, 1986]

MEMORANDUM OPINION

The court deferred ruling on the request of plaintiff, Pete A. Morrison, for instatement in the position of stockroom manager until the court could study the briefs and authorities submitted by both parties on the issue.

First, any grant of mandatory injunctive relief must be based on general principles of equity. In this case if the court should order Morrison into the position of stockroom manager the necessary effect would be to cause the demotion, termination or transfer of the present holder of that position. Two people cannot occupy the same job. While this result should not be the controlling factor in determining whether or not to grant such prospective relief, it may be considered together with the other pertinent factors as to what constitutes "equity" under the circumstances.

Secondly, Morrison is presently employed as a warehouse manager by another employer and, for aught appearing, has a satisfactory relationship with his new employer and is being adequately compensated.

The third and perhaps the most important factor in determining whether or not to instate Morrison as stockroom manager is the fact that Morrison voluntarily resigned as assistant stockroom manager, a matter of fact and law previously found by the court when it granted Genuine Parts' motion for directed verdict as to that aspect of Morrison's complaint claiming a constructive discharge. Although there is no Eleventh Circuit case directly in point, plaintiff's argument is based on a hopeful expansion of *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir. 1981). This court does not read *Spagnuolo* to stand for the proposition pressed upon the court by Morrison. If *Spagnuolo* can be construed to stand for that proposition, this court is not bound by the Fourth Circuit. This court is more persuaded by the D.C. Circuit in *Clark v. Marsh*, 665 F.2d 1168 (D.C. Cir. 1981), which borowed from the Fifth Circuit's rationale in *Bourque v. Powell Electrical Manufacturing Company*, 617 F.2d 61 (5th Cir. 1980), and applied it to an employee's request for instatement after a denial of promotion, and said:

> We readily agree that plaintiff's recovery for the period subsequent to her retirement must rest upon proof *that she 'was [not] the responsible agent in [her] own termination'*. (emphasis supplied).

665 F.2d at 1172.

The D.C. Circuit went on to find that a constructive discharge had, in fact, there taken place, opening up for it the possibility of instatement. If this court committed error in concluding that Morrison was not constructively discharged, then the option of instatement would be open to it on remand. This court does not think it committed

error in this regard in light of *Bourque*, which is binding on this court, and which gives logic to the conclusion that where an employee voluntarily terminates his employment he gives up all claims for reinstatement or for instatement. Another district court has reached a similar conclusion in a published decision. *See, e.g., Adler v. John Carroll University*, 549 F.Supp. 652, 656 (N.D. Ohio, 1982). Honorable Sam C. Pointer, Jr., Chief Judge of this court, in an unpublished opinion, held, in a case directly in point, that voluntary separation precludes all rights to be placed in a higher job position which had been sought and denied. As this court has held, Morrison's frustration and disappointment, while understandable, did not create an intolerable set of working conditions. If it were otherwise, any disappointed employee can create a jury question on "constructive discharge" by the expedient of turning in his resignation shortly after his disappointment.

By separate order plaintiff's request for injunctive relief will be denied.

The court sincerely suggests that the parties resolve by settlement the only remaining issue, namely, the fees and expenses due plaintiff under 42 U.S.C. § 1988.

DONE this 19th day of June, 1986.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV 85-AR-2564-S

PETE A. MORRISON,
Plaintiff,
v.
GENUINE PARTS COMPANY,
Defendant.

[Filed June 26, 1986]

MOTION TO ALTER OR AMEND JUDGMENT

Plaintiff moves for the Court to alter or amend its judgment, to award plaintiff front pay, based on the following:

1. In the Complaint and in the Pre-Trial Order, plaintiff specifically requested the award of front pay, and the Court has never ruled on that request.

2. The first two reasons offered by the Court for refusing to award plaintiff the job he requested provide no reason to deny the award of front pay. If the Court awards front pay, no innocent person will be affected, and plaintiff will remain in his present job.

3. As shown in the attached affidavit of plaintiff, unless the Court at least awards front pay, plaintiff will not be made whole for the discrimination he has suffered.

Respectfully submitted,

/s/ Joe R. Whatley, Jr.
JOE R. WHATLEY, JR.

[Denied 6/27/86, /s/ William M. Acker, Jr., Judge]

Of Counsel:

FALKENBERRY, WHATLEY & HEIDT
Fifth Floor Title Building
300 Twenty-First Street, North
Birmingham, Alabama 35203
205/322-1100

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above and foregoing Motion to Alter or Amend Judgment has been serevd upon the following counsel of record by depositing a copy of same in the U. S. Mail, postage prepaid, on this the 26th day of June, 1986:

Robert N. Godfrey, Esquire
Paul R. Beshears, Esquire
Smith, Currie & Hancock
2600 Peachtree Center Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30043-6601

Jay Clark, Esquire
Clark & Scott
P. O. Box 7687-A
Birmingham, Alabama 35253

/s/ Joe R. Whatley, Jr.
JOE R. WHATLEY, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV 85-AR-2564-S

PETE A. MORRISON,
Plaintiff,

v.

GENUINE PARTS COMPANY,
Defendant.

AFFIDAVIT

STATE OF ALABAMA)
JEFFERSON COUNTY)

Upon being duly sworn, Pete A. Morrison deposes and says as follows:

1. I am submitting this affidavit to support the motion for rehearing which my attorneys are filing for me. While it is true as the Court stated in its Memorandum Opinion that I am presently employed as a warehouse manager by another employer, I am not being compensated at nearly the same level as the stockroom manager. In his deposition, Gary Egan testified that he is currently being paid $25,000.00 per year. I am only being paid $17,000.00 per year in my present position as warehouse manager. Thus, I am being paid $8,000.00 per year less than I would have been paid if I had been awarded the job of stockroom manager. I know of no possibility that

my pay with my present employer will be increased substantially in the foreseeable future.

/s/ Pete A. Morrison
PETE A. MORRISON

Sworn to and subscribed
before me this 23th day
of June, 1986.

/s/ Walter Johnson
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 85-AR-2564-S

PETE A. MORRISON,
Plaintiff

vs.

GENUINE PARTS COMPANY,
Defendant

[Filed June 17, 1986]

ORDER

Plaintiff Pete A. Morrison shall have and recover of defendant Genuine Parts Company the sum of $3,658.87, for which execution shall issue if not paid within 30 days. The proceeds of this judgment shall be paid directly to the attorneys-of-record for plaintiff who, upon receipt thereof, shall satisfy said judgment on the records of this court.

Plaintiff's request for injunctive relief is still under advisement.

DONE this 17th day of June, 1986.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 85-AR-2564-S

PETE A. MORRISON,
Plaintiff

vs.

GENUINE PARTS COMPANY,
Defendant

[Filed June 17, 1986]

MEMORANDUM OPINION

The court gave the parties through June 13, 1986, to file briefs to suggest how to arrive at the amount of liquidated damages, if any, to be imposed against defendant, and the appropriateness of injunctive relief. The court has deferred the entry of judgment on the jury of June 2, 1986, until these left-over issues could be addressed.

For the reasons previously articulated by the court orally, the court will continue to hold Genuine Parts Company to the amount of lost wages which it stipulated as attributable to its failure to promote Pete A. Morrison, although it is probably true that it would not have entered into such a stipulation if it had fully understood the effect of the stipulation in the event Genuine Parts should prevail, as it did, on the question of constructive discharge. Therefore, pursuant to the formal stipulation between the parties and the jury finding of age discrimination, judgment will be entered in favor of plaintiff and

against defendant in the amount of $3,566.62, representing the direct monetary loss incurred by plaintiff as the proximate consequence of his not being promoted, even though Morrison would have been unable to prove this amount without going beyond the date of his voluntary resignation.

The statutory liquidated damages to be imposed in the event an ADEA violation is "willful" cannot, of course, exceed the amount of the actual damages. In the context of liquidated damages, which in this case is distinct from the context of actual damages, the damages as "stipulated" by the parties should not and will not control. Genuine Parts' stipulation of $3,566.62 in actual damages is not susceptible to an interpretation which would expose it to another $3,566.62 in liquidated damages, or a doubling of its strategy error. The actual damages of the pay differential in the job classifications accruing between the date of the failure to promote and the date of Morrison's voluntary resignation, as arithmetically computed, is $92.25. Based on the jury finding and upon the undisputed fact that General Part's decision makers who decided to pass over Morrison and to promote a younger man were well aware of the ADEA, the court finds that Genuine Parts' violation of the ADEA was "willful" and therefore that it should pay liquidated damages in the sum of $92.25. This amounts to a doubling of Morrison's actual monetary loss, as opposed to the loss stipulated by Genuine Parts not in contemplation of the present set of circumstances.

A money judgment will be entered accordingly.

Morrison also urges that he should be instated in the position which he was denied. The court will address this issue in a separate opinion.

DONE this 17th day of June, 1986.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case Number: CV 85-AR-2564-S

PETE A. MORRISON,

Plaintiff

vs.

GENUINE PARTS COMPANY,

Defendant

[Filed June 4, 1986]

CLERK'S COURT MINUTES

This action came on for trial on June 2, 1986, before the Court and a jury, Honorable William M. Acker, Jr., United States District Judge, presiding, and the issues were duly tried and the jury duly rendered its verdict.

A written judgment will be entered by the court based on the Special Interrogatory to Jury, this date filed as follows:

> "Was the age difference between Pete A. Morrison and Rusty Eagan a determining factor in Genuine Parts Company's decision to promote Mr. Eagan rather than Mr. Morrison to stockroom manager?"
>
> ANSWER: "Yes".

GENE E. BELL
Acting Clerk

By: /s/ Rita F. Durnck
Deputy Clerk

DATED: June 4, 1986, Birmingham, Alabama

Court Reporter: Lee Cook

Supreme Court, U.S.
FILED
JAN 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1058

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PETE A. MORRISON,
Petitioner,
v.

GENUINE PARTS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GEORGE K. McPHERSON, JR.
Counsel of Record

ROBERT N. GODFREY
SMITH, CURRIE & HANCOCK
2600 Peachtree Center Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30043-6601
404/521-3800

Attorneys for Respondent,
Genuine Parts Company

15pp

QUESTION PRESENTED

Is it within the discretion of the District Court to consider the plaintiff's voluntary resignation as one factor, among others, which precludes an award of reinstatement to a position denied the plaintiff prior to his resignation, absent a separate finding of constructive discharge?

PARTIES

Respondent, Genuine Parts Company, is affiliated with the following companies which are not wholly-owned subsidiaries:

1. Balkamp, Inc.
   Incorporated in Indiana

2. Henry-Bell Enterprises, Inc.
   Incorporated under provincial laws of Alberta, Canada

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STATUTES

42 U.S.C. § 2000e-5(g) (1970 ed. Supp. III) 3

STATEMENT OF THE CASE

Pete Morrison was employed by Genuine Parts Company as assistant stockroom manager. When the stockroom manager's position became available, Mr. Morrison was not given the position. The individual awarded the position was younger than Mr. Morrison, who at the time was more than 50 years old. Within two weeks after he knew he was not going to be promoted to stockroom manager, Mr. Morrison resigned.

Morrison sued Genuine Parts, alleging the failure to promote him to have been in violation of the Age Discrimination in Employment Act ("ADEA"). He further claimed that his resignation was non-voluntary; that he had been constructively discharged.

At trial, the court directed a verdict in favor of the Company on the constructive discharge claim. The jury found for Morrison on his promotion claim. The trial court concluded that Genuine Parts acted wilfully under the standard that its agents knew of the existence of the ADEA. Back pay, liquidated damages and attorneys' fees were awarded Morrison. Reinstatement and front pay were denied by the District Court on a number of grounds, including the fact that Morrison had resigned shortly after learning that he was not to be promoted.

The United States Court of Appeals for the Eleventh Circuit affirmed the jury verdict and the findings of the trial court in all relevant respects, including the finding that Morrison's resignation was a factor which, *inter alia,* precluded an award of reinstatement or front pay. It is the affirming of this ruling which Morrison petitions.

SUMMARY OF ARGUMENT

Neither *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) nor *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) relieved United States District Courts of the discretion to fashion remedies in discrimination lawsuits on a case-by-case basis. Neither case dictated that any district court was bound to impose equitable remedies to the same extent that those courts are compelled to award traditional legal relief.

There is no conflict between circuits. The *Spagnuolo* decision is not contrary to the decision in the case at bar -- only the result is different. Moreover, the decision of the Eleventh Circuit is in harmony with decisions in other circuits which have addressed the issue.

ARGUMENT

I. THE RULING BELOW IS ENTIRELY CONSISTENT WITH THE DICTATES OF THE UNITED STATES SUPREME COURT'S INTERPRETATIONS OF THE PURPOSE OF FEDERAL ANTI-DISCRIMINATION LAWS.

Petitioner urges this Court to adopt an expansive reading of *Albemarle Paper Co. v. Moody, supra,* and *Franks v. Bowman Transportation Co., supra,* under which the federal district courts are stripped of their traditional discretion in matters of equity, and are bound to perform no more than ministerial functions in fashioning remedies for discrimination. This plainly was not the intent of the Court in these two cases.

Albemarle involved the question of a court's discretion in awarding back pay, a remedy specifically provided for in Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(g) (1970 ed., Supp. III), which provided:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may ... order such affirmative action as may be appropriate, which *may* include, but is not limited to, reinstatement or hiring of employees, *with or without back pay* ..., or any other equitable relief as the court deems appropriate. (Emphasis supplied.)

It was the interpretation of the term "may" and the phrase "with or without back pay" that the Court faced in deciding the propriety of the district court's withholding a back pay award in a case involving a discriminatory seniority system. The case was remanded with the lower court's discretionary powers intact, with direction from this Court that the employer's lack of bad faith was irrelevant to the determination of the propriety of an award of back pay.

In giving guidance to the United States Court of Appeals for the Fourth Circuit as to its review of subsequent decisions, this Court in *Albemarle* stated,

> [T]he standard of review will be the familiar one of whether the District Court was "clearly erroneous" in its factual findings and whether it "abused" its traditional discretion to locate "a just result" in light of the circumstances peculiar to the case ... . *On these issues of procedural regularity and prejudice,* the "broad aims of Title VII" provide no ready solution.

422 U.S. at 425, 426 (Emphasis supplied.) (Citation omitted.)

The decision in *Franks* is consistent with *Albemarle* in its reserved approach to infringing upon the traditional discretion of the district courts. *Franks* involved race-conscious failure to hire claims, with the propriety of awarding back pay and seniority to a class of unhired applicants at issue before this Court. In addressing the question of discretion, the Court in *Franks* made it clear that it was applying the principles enunciated in *Albemarle* but cautioned,

> We are not to be understood as holding that an award of seniority status is requisite in all circumstances. The fashioning of appropriate remedies invokes the sound equitable discretion of the district courts.

424 U.S. at 771. After deciding upon the facts of the case then before it that the failure to award seniority was error, the Court again offered a *caveat:*

> In holding that class-based seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate under § 706(g), we do not in any way modify our previously expressed view that the statutory scheme of Title VII "implicitly recognizes that there may be cases calling for one remedy but not another, and -- owing to the structure of the federal judiciary -- these choices are, of course, left in the first instance to the district courts." *Albemarle Paper,* 422 U.S., at 416.

424 U.S. at 780.

Thus, the cases upon which Petitioner relies for the proposition that the decision in the case at bar "violates the ... remedial purpose of the federal discrimination laws" stand more convincingly for the proposition that what the District Court and Court of Appeals did in the case at bar is entirely consistent with the dictates of this Court with regard to the function of the federal judiciary. In exercising its traditional discretionary powers in this case, the district court acted in total comportment with the guidance of this Court, as clearly demonstrated in the Memorandum Opinion appearing at page 5a of the Appendix to the Petition. Likewise, in affirming the lower court's decision, the Eleventh Circuit obviously correctly applied the standard recognized in *Albemarle*. As such, the asserted basis for review by this Court, i.e., inconsistency with the purpose of the ADEA, is without foundation.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

A. THE HOLDING OF THE ELEVENTH CIRCUIT IN THE CASE AT BAR IS NOT INCONSISTENT WITH THAT OF THE FOURTH CIRCUIT IN *SPAGNUOLO V. WHIRLPOOL CORP.*, 641 F.2d 1109 (4th Cir. 1981) *cert. denied* 454 U.S. 860 (1981).

As with his reading of the *Albemarle* and *Franks* decisions, the Petitioner's reading of *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir. 1981) *cert. denied* 454 U.S. 860 (1981) is faulty.

In *Spagnuolo*, the plaintiff was demoted and was replaced by a younger man. The plaintiff resigned two months later to accept a job with a competitor of the defendant at a higher salary than he was paid in the position to which he had been demoted. Upon a finding of age discrimination in the demotion, reinstatement of the plaintiff to his former (pre-demotion) position was ordered.

On appeal, the defendant contended that it was error for the trial court not to have instructed the jury "that plaintiff could recover loss of salary only if it found that he had been 'constructively discharged' by Whirlpool." 641 F.2d at 1114. The Court of Appeals in *Spagnuolo* found no reversible error in the failure to give such an instruction since the district court did instruct on the plaintiff's duty to mitigate damages, and the fact that the plaintiff did leave to accept higher paying employment, concluding, "There was therefore no factual basis on which to submit the concept of constructive discharge to the jury." *Id.*

The defendant's attack upon the remedy of reinstatement in *Spagnuolo* was totally unrelated to the issue of constructive discharge. The appellate court in *Spagnuolo* assessed the issue thusly:

> Whirlpool vigorously attacks the equitable relief of reinstatement granted by the district court. It posits that plaintiff lacks the qualifications for the new position that was created by combining two managerships and that the animosities and tensions between the parties make reinstatement infeasible.

641 F.2d at 1114-1115.

Therefore, there is no basis upon which to compare the case at bar with *Spagnuolo* and to reach a conclusion that the decisions conflict. In *Spagnuolo,* the Fourth Circuit declared that "constructive discharge" was not an issue to the extent it was asserted on the question of back pay, and constructive discharge was never raised as an issue with regard to reinstatement. By comparison, in the case at bar, constructive discharge was a core issue throughout the proceedings and a specific and separate finding on that issue was made and entered by the trial court, and was presented to and affirmed by the Eleventh Circuit.

Thus, although the outcome of these two cases is dissimilar upon similar facts, the legal issues before the district and appellate courts were inapposite. As such, no conflict exists between the Fourth and Eleventh Circuits on principles of law, and the jurisdiction of this Court on that basis is improperly invoked.

B. THE HOLDING OF THE ELEVENTH CIRCUIT IN THE CASE AT BAR IS IN HARMONY WITH DECISIONS IN OTHER CIRCUITS WHICH HAVE ADDRESSED THE ISSUE.

The legal principle about which Petitioner complains has been applied in the same manner as applied in the case at bar by other circuit courts. For example, prior to the decision now before this Court, the United States Court of Appeals for the Eleventh Circuit, in *Wardwell v. School Board of Palm Beach County, Florida,* 786 F.2d 1554 (11th Cir. 1986) reviewed a hybrid failure to promote/constructive discharge case. Upon concluding that the district court erred in finding constructive discharge, the appellate court concluded, on petition for rehearing, that its "conclusion that the district court was clearly erroneous in finding a constructive discharge necessarily means that the injunction requiring reinstatement must be vacated." 786 F.2d at 1558.

In a similar case involving the hybrid issues of demotion and constructive discharge, the United States Court of Appeals for the Tenth Circuit in *Derr v. Gulf Oil Corp.,* 796 F.2d 340, 342 (10th Cir. 1986), after affirming the finding of unlawful discrimination in the demotion, but finding no constructive discharge, concluded that the plaintiff's back pay period ended with her resignation, and that the plaintiff was "not entitled to reinstatement if she was not constructively discharged."

The United States Court of Appeals for the District of Columbia Circuit has implicitly endorsed the principle in two separate opinions. In *Clark v. Marsh,* 665 F.2d 1168, 1173 (D.C. Cir. 1981), in a case involving a hybrid failure to promote and

constructive discharge, the court acknowledged the soundness of the employer's challenge to the award of reinstatement and back pay beyond the date of resignation, absent a finding of constructive discharge, wherein it noted:

> We readily agree that plaintiff's recovery for the period subsequent to her retirement must rest upon proof that she "was [not] the responsible agent in [her] own termination."

Id. at 1172.

In *Hopkins v. Price Waterhouse,* 825 F.2d 458, 472-473 (D.C. Cir. 1987), the hybrid question was one of failure to offer partnership and constructive discharge. Although the case was remanded to the district court on the ultimate issue of constructive discharge, the appellate court implicitly endorsed the trial court's determination that even if the denial of partnership was unlawful,

> If the plaintiff resigned voluntarily, and not because Price Waterhouse made working conditions intolerable and drove her to quit, she is not entitled to an order that she be made a partner.

Hopkins v. Price Waterhouse, 618 F.Supp. 1109, 1121 (D.D.C. 1985).

In another hybrid failure to promote/constructive discharge case, in which the district court concluded remedies had become moot with regard to relief for the failure to promote because of the plaintiff's resignation, the United States Court of Appeals for the Ninth Circuit offered the following guidance to the district court on remand of the constructive discharge issue:

> If the district court decides that there was a constructive discharge, relief granted by the district court will include a remedy for the discriminatory [failure to promote]. If the district court decides that there was no constructive discharge and Nolan's resignation was voluntary, the district court's mootness conclusion would be applicable.

Nolan v. Cleland, 686 F.2d 806, 814 (9th Cir. 1982). See also, *Gomez v. Great Lakes Steel Division, National Steel Corp.,* 803 F.2d 250, 256-7 (6th Cir. 1986) (In hybrid case, "If there is no actionable constructive discharge, Gomez cannot recover for those losses directly attributable to his voluntary decision to retire.")

Given this consistent adherence among the circuits to this legal principle, it is obvious that instead of a conflict existing, there is harmony within the circuits.

CONCLUSION

There being no inconsistency in the decision below with federal law or decisions of the United States Supreme Court, and no conflict between the decision and any other circuit court of appeals upon principles of law, there is no basis for assertion of jurisdiction by this court. Upon such grounds and upon the foregoing argument and authority, Respondent respectfully submits that the Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE K. McPHERSON, JR.
Counsel of Record

ROBERT N. GODFREY
SMITH, CURRIE & HANCOCK
2600 Peachtree Center Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30043-6601
404/521-3800
Attorneys for Respondent,
Genuine Parts Company

CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel with a true and accurate copy of **BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT** by depositing same in the United States Mail, postage prepaid, addressed as follows:

Joe R. Whatley, Jr., Esq.
Falkenberry & Whatley
Fifth Floor, Title Bldg.
300 Twenty-First St. North
Birmingham, Alabama 35203

This 26th day of January, 1988.

GEORGE K. McPHERSON, JR.